STATE OF MICHIGAN

COURT OF APPEALS

HARRY LAZECHKO,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellant,

and

ALLSTATE INSURANCE COMPANY,

Defendant.

UNPUBLISHED
April 28, 2005

No. 251061
Wayne Circuit Court
LC No. 02-217713-CK

HARRY LAZECHKO,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant,

and

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

No. 251245
Wayne Circuit Court
LC No. 02-217713-CK

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, both defendants Allstate Insurance Company and Auto-Owners Insurance Company appeal by leave granted the trial court's order denying their motions for summary disposition. Defendants' motions for summary disposition sought to prevent

plaintiff from recovering under insurance policies issued by them on the basis that plaintiff lacked an insurable interest in the property. We affirm. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiff held title to a twelve-acre parcel of improved property located at 27133 Sharard in New Hudson, Michigan (the property). He leased the dwelling on the property to Joseph and Ann Melville. Plaintiff and the Melvilles became involved in litigation over the property, and, on December 14, 2001, the parties reached a "settlement agreement." The agreement provided, in part, that:

> A. That the parties shall enter into the Land Contract attached as Exhibit A hereto, however, if any terms of the Land Contract conflict with the terms of this Agreement and Order; this Order and Agreement shall prevail. If the terms of the Land Contract are not complied with in its entirety, then it shall be void, and of no effect, and cannot be introduced as evidence in any matter, as it is a product of settlement negotiations and is only being used to that effect and no other.

The land contract included a provision stating it "is controlled by [the above] Oakland Circuit Court Order." Under the land contract, plaintiff agreed to sell the property to the Melvilles for $375,000, which the Melvilles were required to pay on or before March 11, 2002. The land contract also provided that "Purchaser agree . . . to keep the building now and hereafter on the land insured against loss and damage . . . . " The Mellvilles, on December 8, 2001, obtained from Allstate a "Deluxe Plus Homeowners'" insurance policy which endorsed plaintiff as an "Additional Insured-Non-Occupant." Plaintiff also maintained a "Dwelling Insurance" policy with Auto-Owners as an "insured."

On January 27, 2002, fire destroyed the dwelling.[1] However, the Melvilles did not pay plaintiff on or before March 11, 2002. Consequently, plaintiff brought a motion to enforce certain provisions of the settlement agreement providing for sale of the property in the event the Melvilles did not pay. However, the plaintiff and the Melvilles later reached an agreement, which was memorialized in an "order regarding plaintiff's motion for judgment," which stated:

> Whereas, the Land Contract between these parties, have not been fulfilled, and is therefore void pursuant to the terms of the Settlement Agreement entered into by the parties;
>
> Whereas, the Defendants still wish to purchase the property and Plaintiff still wishes to sell the property

[1] Notably, evidence was presented that, with the dwelling demolished, the New Hudson property increased in value because it could be divided; one report appraised a two-acre parcel at $110,000.

* * *

> It is hereby ordered and adjudged that the defendant [sic] has until 5:00 p.m. on April 4, 2002, to close the sale of property, pursuant to the sales price set forth in the Land Contract, as well as the additional considerations set forth herein.

On April 3, 2002, plaintiff executed a warranty deed to the Melvilles for $375,000.

Meanwhile, plaintiff requested Auto-Owners pay for the loss of the dwelling. Auto-Owners refused to pay, and, on May 24, 2002, plaintiff filed a complaint against Auto-Owners alleging breach of contract and bad faith. Plaintiff subsequently amended the complaint to include Allstate as a defendant.

Defendants moved for summary disposition, arguing that plaintiff suffered no pecuniary loss from the fire where, before the fire, plaintiff agreed to sell the property to the Melvilles for $375,000, and he received that amount from the Melvilles after the fire. Plaintiff responded, arguing that defendants were barred from introducing the settlement agreement in the instant action. The court denied defendants' motions for summary disposition, stating only that a question of fact existed.

II. Summary Disposition

A. Standard of Review

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Nastal v Henderson & Associates Investigations*, Inc., 471 Mich 712, 721; 691 NW2d 1 (2005) (citations omitted).]

B. Insurable Interest

Although neither Allstate's or Auto-Owners' policies define the phrase, "insurable interest." the policies respectively provide that:

> In the event of a covered loss, **we** will not pay for more than an **insured person's** insurable interest in the property covered, nor more than the amount of coverage afforded by this policy.

> Subject to the applicable limit of insurance, **we** will not pay more than the insurable interest the **insured** has in the covered property at the time of the loss.

Historically, insurable interest was not required for a contract of insurance. 3 Couch on Insurance 3d, § 41:1, p 41-3. However, "[i]n the early eighteenth century, underwriters began to issue marine insurance policies in which they agreed not to demand proof of the insured's

interest in the ship or cargo that was the subject of insurance." Keeton and Widiss, Insurance Law, § 3.2(a), citing 1 Arnould, Marine Insurance 15 ed, at § 364. These insurance policies prompted English lawmakers to promulgate St. 19 Geo. II, c, 37, the preamble to which provided that such insurance contracts had "'been productive of many pernicious practices, whereby great numbers of ships, with their cargos, have . . . been fraudulently lost and destroyed, . . . ' and whereby there was introduced "a mischievious kind of gaming or wagering, under the pretence of assuring the risque of shipping." Keeton and Widiss, *supra*, citing 19 Geo 2, c. 37 (1746). The statute applied only to marine insurance and declared that "no assurance or assurances shall be made. . . interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without the benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes." Keeton and Widiss, *supra*, quoting 19 Geo 2, c. 37 (1746).

In *Crossman v American Ins Co of Newark, N.J.*, 198 Mich 304, 308; 164 NW2d 428 (1917), our Supreme Court recognized the historical origin of the doctrine of insurable interest, stating that "all species of gambling contracts were expressly prohibited in England by St 19 Geo. 2 c 37." Further that "such contracts are treated as contravening public policy, and are therefore void." *Id*. *Crossman* extensively reviewed the doctrine of insurable interest, and has often since been cited for the proposition that, an insurable interest in property is broadly defined as being present when the person has an interest in property, as to the existence of which the person will gain benefits, or as to the destruction of which the person will suffer loss. See *Universal Underwriters Group v Allstate Ins Co* 246 Mich App. 713, 726; 635 NW2d 52 (2001); *Secura Ins Co v Pioneer State Mut Ins Co*, 188 Mich App 413, 415; 470 NW2d 415 (1991); *Root v Hamilton Mut Ins Co*, 116 Mich App 596, 600; 323 NW2d 298, (1981); *Capital Mortg Corp v Michigan Basic Property Ins Ass'n*, 78 Mich App 570, 574; 261 NW2d 5 (1977).

Here, there is no dispute that plaintiff had an interest in the insured property at the time of the fire. Plaintiff held title to the property and leased the premises to the Melvilles. See *Capital Mortg Corp, supra*. Although plaintiff entered a land contract with the Mellvilles for the sale of the property, plaintiff was not to convey his interest in the land until the Melvilles fully paid the sales price before March 11, 2002. The Mellvilles did not pay on March 11, 2002, and consequently plaintiff did not convey any interest to the property pursuant to the land contract that was in effect at the time of the loss. At most, defendants have shown that, at the time of the loss, plaintiff was a vendor under a conditional sales contract, which does not admit the lack of an insurable interest. Rather, the vendor under a land contract retains title and has an insurable interest in the property. See *McCoy v Continental Ins Co*, 326 Mich 261, 267-269; 40 NW2d 146 (1949); *Sietsema v Fremont Mut Ins Co*, 38 Mich App 582; 196 NW2d 841 (1972). Even defendant Auto-Owners admits in its brief on appeal that "a scenario could have existed where Plaintiff would have suffered a pecuniary loss as a result of the January 2002, fire. For example, the Melvilles could have refused to go through with the sale and either broken or walked away from the land contract." (emphasis omitted.)

In addition, there is evidence establishing that plaintiff suffered a pecuniary loss when the fire completely destroyed the dwelling. Plaintiff presented evidence that the dwelling had economic value through appraisals of the property done shortly before the fire, and his lease of the property at the time of the fire. See *Chicago Title & Trust Co v United States Fidelity & Guaranty*, 511 F2d 241, 246-248 (CA 7, 1975).

Further, defendants' argument fails to consider the entire transaction between plaintiff and the Melvilles. As plaintiff notes, the land contract was part of the settlement agreement that resolved other claims between plaintiff and the Melvilles.[2] The land contract specifically provided that it "is controlled by an Oakland Circuit Court Order filed in case # 00 23309 CZ." The settlement agreement provided, in part, that:

> The parties shall enter into the Land Contract attached as Exhibit A hereto, however, if any terms of the Land Contract conflict with the terms of this Agreement and Order; this Order and Agreement shall prevail. If the terms of the Land Contract are not complied with in its entirety, then it shall be void, and of no effect, and cannot be introduced as evidence in any matter, as it is a product of settlement negotiations and is only being used to that effect and no other.

The settlement agreement also reflects the parties' belief that a real estate agent could obtain more than $375,000 for the property. The settlement agreement states, in part:

> If the Defendants, jointly and severally, cannot close or obtain an unconditional mortgage commitment to be closed immediately thereafter, for pay-off of the Land-Contract for the property pursuant to the Land Contract and this Agreement/Order, the property shall be sold pursuant to the following procedure:
>
> If the property is to be sold pursuant to the terms herein, the following procedure is to be followed:
>
> 1. The property shall be immediately (within two (2) days) placed for sale with Nancy Ajlouny of Reamerica Home Town II, in Plymouth, Michigan, at the best commission obtainable, but no more than 5%.
>
> 2. If the parties cannot agree on a listing price, the house shall be appraised at the best price for an expeditious sale, and the listing price shall be said appraisal amount.
>
> 3. Defendants, jointly and severally, shall vacate the property and completely clean up the property, inside and outside, remove any occupiers, and prepare the property for sale within five (5) days of the direction of the realtor, as to what is necessary to bring the property up to a condition to obtain the best price, at the best use for an expeditious sale, in the realtor's sole discretion. Defendants, jointly and severally, shall solely bear the expenses in the preparation of the property for sale. Upon the sale of the property, the net sale price shall be distributed with the first $375,000.00 to be paid to the Plaintiff, Harry Lazechko, from net dollar(s[)] $375,000.00 though $424,999.00 shall be payable to Defendants, jointly and severally, from dollars(s) $425,000.00 thereafter, the

[2] The settlement agreement provided in relevant part, that, the "parties hereto stipulate as to the dismissal of 00-023309 CZ and 01-DA7591-AV, with prejudice, . . . "

> parties shall divide each dollar thereafter equally between the Plaintiff (for 50%) and Defendants together for the other 50%.

Thus, the settlement agreement indicates that the fair market value of the property is not necessarily $375,000, but may be higher. Thus, the settlement agreement suggests that plaintiff could have sold the property through the real estate agent for more than $375,000, though he would still be in litigation over the property with the Melvilles. This conclusion is also supported by appraisals conducted shortly before the fire indicating that property was worth more than $375,000. Thus, the trial court properly denied defendants' motions for summary disposition, because viewing the evidence in the light most favorable to plaintiff, a question of fact exists whether plaintiff suffered a direct pecuniary loss. *Nastal, supra*.

B. Extent of Insurable Interest

Defendants claims that plaintiff's insurable interest in the property is limited to the $375,000, he received from the Melvilles because that is the price he agreed to under the land contract at the time of the loss. Thus, defendants maintain that because plaintiff ultimately accepted $375,000, from the Melvilles in April of 2002, he has recovered the full extent of his insurable interest, and thus further recovery is barred. We disagree.

This argument was rejected in *Sietsema v Fremont Mut Ins Co, supra*. In *Sietsema*, the plaintiffs sold a parcel of property under a land contract. *Id*. at 583. The land contract required the buyers maintain property insurance, which they purchased from the defendant. *Id*. A barn on the property was destroyed by wind. *Id*. at 585. The buyers defaulted on the land contract, and the plaintiff's obtained judgment against them. *Id*.

The plaintiff's counsel made a formal request for payment, and eventually filed suit. *Sietsema, supra*. "[The] [d]efendant first argue[d] that since [the] plaintiffs subsequently resold the property for an amount greater than that due on the land contract at the time of the loss, they have in fact incurred no loss." *Id*. This Court rejected this claim, agreeing with the trial court that "the rights of the parties were fixed at the time of the loss." *Id*. citing *Booker T. Theater Co v Greater American Ins Co v N.Y.*, 369 Mich 583; 120 NW2d 776 (1963). The Court therefore held that the "plaintiffs' subsequent resale of the property [for a higher price] is not a bar to recovery." *Id*.

Here, defendants similarly argue that plaintiff's subsequent resale of the property for an amount greater than or the same as that owed under the contract at the time of the loss bars plaintiff's recovery. *Sietsema* is controlling, and "the rights of the parties were fixed at the time of the loss." Moreover, we note that in the instant case the Melvilles failure to comply with the settlement agreement voided the land contract, rendering moot defendants' contention that the

Melvilles paid the balance under the December 14, 2001, land contract. Thus, plaintiff's sale of the property for the same amount listed on the December 14, 2001, land contract after the fire does not bar plaintiff's recovery.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper